

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CELESTE COFFLAND-BUSBY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>SAM'S WHOLESALE CLUB</b>	)	
Respondent	)	Docket Nos. 250,015
	)	& 1,003,080
AND	)	
	)	
<b>INS. CO. STATE OF PENNSYLVANIA</b>	)	
<b>AMERICAN HOME ASSURANCE</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent, Sam's Wholesale Club, and one of its insurance carriers, American Home Assurance, request review of a preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery on May 30, 2002.

**ISSUES**

The claimant filed a claim against respondent for repetitive injuries to her low back up to and including July 1, 1998. That claim was assigned Docket No. 250,015 and was resolved by settlement hearing on April 25, 2001. The right to future medical treatment was left open.

Before that claim was settled the claimant returned to full-time work for respondent. Thereafter, the claimant began to experience additional back pain including radicular pain into her left leg. Respondent provided claimant additional medical treatment until it received an emergency room medical report of December 19, 2001, which indicated claimant had suffered increased back pain after baking cookies at home on December 14, 2001. Respondent then terminated treatment concluding claimant had suffered an intervening accident.

On April 4, 2002, claimant filed an Application for Hearing alleging back injury on or about May 7, 2001. This claim received Docket No. 1,003,080. Claimant additionally filed an Application for Post-Award Medical on April 12, 2002, in Docket No. 250,015. On

May 24, 2002, the two requests for additional medical treatment were consolidated for hearing. The Administrative Law Judge determined claimant had suffered a series of new accidental injuries through May 7, 2001, as alleged in Docket No. 1,003,080 and ordered respondent to provide claimant treatment with Dr. Amundson. The Administrative Law Judge additionally ordered respondent to pay certain medical bills and temporary partial disability.

On review the respondent argues claimant suffered an intervening accidental injury on December 14, 2001, and accordingly, any need for medical treatment after that date is not related to claimant's employment with respondent. Respondent also argues the Administrative Law Judge erred in ordering respondent to pay certain medical expenses as well as temporary partial disability compensation.

Conversely, claimant argues there was no intervening accident and the Administrative Law Judge's Order for Medical Treatment should be affirmed.

#### **FINDINGS OF FACT**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has been employed by respondent for over 10 years. During the course of her employment in 1998, she suffered a back injury while performing her job duties as a stocker. An MRI performed July 21, 1998, revealed a herniated nucleus pulposus centrally and to the left at L4-5, with a smaller herniation at L3-4, and a generalized bulging at L5-S1.

Claimant underwent a course of conservative treatment and ultimately returned to full duty work with respondent. As previously mentioned, the claim for compensation filed as a result of the 1998 injury was settled with the right to future medical treatment left open.

Upon her return to full-time work the claimant began to experience a gradual worsening of her back pain with radicular pain down into her left leg. Finally, after working approximately seven hours on May 7, 2001, the claimant could no longer stand the pain and requested medical treatment. Respondent referred claimant to St. Francis Hospital where she received treatment from the emergency room doctor. She was later referred to K.N. Arjunan, M.D., for treatment.

Claimant began a three day work week with respondent which consisted of performing her stocking job duties for half the day and answering telephones the remainder of the work day.

On July 23, 2001, Dr. Arjunan noted an MRI performed May 22, 2001, indicated, when compared with the July 21, 1998 MRI, a slight increase in the disc herniation at L4-L5 which is central and left sided and does cause lateral recess restriction. A course of oral steroids were prescribed and the doctor recommended claimant continue to work part-time.

On October 22, 2001, Dr. Arjunan concluded claimant's condition was stable and recommended she gradually increase her work as tolerated and try to return to full-time work. The claimant was to return as needed for additional treatment.

Claimant continued to work part-time. On December 19, 2001, claimant requested additional treatment and was again referred to the emergency room at St. Francis Hospital. The hospital record contains a history of complaint of low back pain for five days and the notation "Patient states that she did a lot of cooking about 5 days ago and since that time has had back spasm. Initially hurt back while at work 3 years ago and hasn't had any significant problems since then until now."

The claimant testified the medical report does not contain a fair statement of what she told the doctor. In addition, claimant explained the cookie baking incident in the following fashion:

Q. And you heard Mr. Kauphusman indicate that their position was that this was a new injury. Would you explain what took place that day and what you told the doctor and what this is all about?

A. Okay. As a rule because of my back I really only allow myself certain goals for the day and that particular day I wanted to make a batch of cookies. And the Christmas tree needed an extension cord plugged into it for the lights. And those were the two things that I did. I only baked one batch of cookies and muscle -- no, my back had always been bothering me anyway but the muscle spasm started gradually increasing into the evening. By evening time I could hardly walk. The cookies were baked early mid-morning. It wasn't something that just happened, it was something that just progressed.<sup>1</sup>

Although claimant had been advised to return to the hospital for a recheck, she received a telephone call advising her the respondent denied any further medical treatment because her injury was not work-related.

Claimant then sought additional treatment with her personal physician, Chester R. Davis, M.D. Dr. Davis' office note of December 14, 2001, contains the notation that on December 14 claimant started hurting "baking a lot for Christmas."

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<sup>1</sup>Preliminary Hearing dated May 24, 2002, at 17-18.

Claimant continues to work part-time approximately 22.5 hours a week.

### CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.<sup>2</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>3</sup>

An accidental injury is compensable where the accident arose out of and in the course of employment.<sup>4</sup> The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.<sup>5</sup>

The claimant testified that after her injury in 1998 when she returned to full-time work she began to experience back pain with radicular pain into her left leg. When she could no longer tolerate the pain claimant requested and respondent provided her with additional medical treatment. As a result of her work-related activities after her return to work on January 9, 2001, claimant suffered a series of repetitive injuries which aggravated her preexisting lower back condition. Dr. Arjunan noted that claimant’s herniated disc at L4-5 had increased. The Board agrees with and adopts the Administrative Law Judge’s finding claimant has suffered a new work-related aggravation of her preexisting injury upon her return to work.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>6</sup> It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.<sup>7</sup> Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

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<sup>2</sup>K.S.A. 44-501(a).

<sup>3</sup>K.S.A. 44-508(g).

<sup>4</sup>K.S.A. 44-501(a).

<sup>5</sup>Harris v. Bethany Medical Center, 21 Kan. App.2d 804, 909 P.2d 657 (1995).

<sup>6</sup>Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>7</sup>Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

The dispositive issue is whether claimant has suffered an intervening non-industrial injury. Respondent argues the claimant suffered a new injury while baking cookies at home.

The claimant's uncontradicted testimony was that on the day she baked the cookies her back had been bothering her anyway and the muscle spasm started gradually increasing during the evening. Claimant was still working part-time and had not reached a point where she could return to her work full-time. Moreover, although Dr. Arjunan had released claimant he noted she should return for further treatment as needed.

There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. Based upon the current record, the Board finds that claimant's baking cookies at home, though perhaps a factor in claimant's increased symptoms, was not an intervening injury. Her condition, therefore, is compensable as a direct and natural consequence of the series of injuries culminating with treatment on May 7, 2001. Accordingly, respondent should remain liable for claimant's ongoing medical treatment as a result of the work-related injury in Docket No. 1,003,080. The Administrative Law Judge's Order for Medical Treatment should, therefore, be affirmed.

Respondent additionally challenges the Administrative Law Judge's award of temporary partial disability and payment of certain medical expenses.

The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:<sup>8</sup>

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.<sup>9</sup> Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but

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<sup>8</sup>K.S.A. 44-534a.

<sup>9</sup>K.S.A. 44-551.

includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.<sup>10</sup>

K.S.A. 44-534a grants authority to an Administrative Law Judge to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation. The preliminary hearing statute found at K.S.A. 44-534a gives the Administrative Law Judge authority to grant or deny the request for medical compensation pending a full hearing on the claim. Thus, the Administrative Law Judge did not exceed his jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary findings regarding temporary partial disability and medical compensation.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.<sup>11</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 30, 2002, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2002.

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Michael R. Kauphusman, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>10</sup>See Taber v. Taber, 213 Kan. 453, 516 P.2d 987 (1973); Provance v. Shawnee Mission U.S.D. No. 512, 235 Kan. 927, 683 P.2d 902 (1984).

<sup>11</sup>K.S.A. 44-534a(a)(2).